



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 23, 1995

Ms. D. Diane Smith  
Staff Attorney  
Legal Services Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR95-439

Dear Ms. Smith:

You have asked this office to determine if certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 28587.

The Texas Natural Resource Conservation Commission (the "TNRCC") has received open records requests from Gibson Recycling, Inc. ("Gibson") and from the Texas Association of Scrap Tire Recyclers (the "association") for information about certain audits, including all records relating to those audits. The attorney for Gibson has indicated to this office that the only audit information Gibson is seeking concerns audits that relate to Gibson. The association asked for information about audits that relate to Gibson and other waste tire processors. You contend that the requested records are excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code.

You contend that the information at issue is made confidential pursuant to section 552.101 of the Government Code in conjunction with section 361.493 of the Health and Safety Code. Section 552.101 provides an exception from disclosure for information that is considered to be confidential by law. Section 361.493 provides:

Information submitted to [TNRCC] in accordance with Section 361.477(g) or Section 361.486(a) or (d), and any report generated by [TNRCC] based on the information, is confidential and is not

subject to disclosure under [chapter 552], and [TNRCC] shall protect the information accordingly.

Sections 361.477(g) and 361.486(a) and (d) concern waste tire recycling. Section 361.477(g) concerns payments to waste tire processors under certain conditions, and states that TNRCC:

may reimburse a processor for shredded scrap tires if the processor has a binding agreement to deliver the shredded scrap tires to a person to recycle or reuse or to use for energy recovery within 180 days after the date of reimbursement.

Subsections (a) and (d) of section 361.486 provide:

(a) On and after January 1, 1996, for all new, amended, and renewal processing registration applications, the processor must identify those persons who will accept the processor's shredded tire pieces for recycling or reuse or to use the shredded scrap tires for energy recovery. The commission shall reimburse a processor for only those shredded tires that the commission determines are committed to a legitimate end user.

....

(d) On or before January 1, 1994, and on a semiannual basis thereafter, registered processors and storage site owners and operators shall report their recycling, reuse, and energy recovery activities to the commission. The commission by rule shall prescribe the form and other requirements of the report.

You submitted information responsive to the requests to this office for review.<sup>1</sup> You contend that the submitted "work papers contain information throughout which derived from the tire processors' monthly Operations Reports and which is confidential by law pursuant to §361.493 of the Texas Health and Safety Code." As previously discussed, section 361.493 provides for confidentiality for information submitted

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<sup>1</sup>You submitted to this office representative samples of the information at issue. We assume that the representative samples of information you supplied to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body can submit representative sample; but if each record contains substantially different information, all must be submitted.) This decision does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than what was submitted to this office.

to TNRCC pursuant to sections 361.477(g) and 361.486(a) and (d). Section 361.493 also provides that reports TNRCC generates based on this submitted information are confidential. Section 361.486(a) does not appear applicable to the information you submitted as being at issue. Section 361.486(d) requires semi-annual reports. In your argument, you discuss monthly reports rather than semi-annual reports.

We assume you are asserting that the documents at issue contain information required to be submitted to TNRCC on a monthly basis or generated by TNRCC pursuant to section 361.477(g) and applicable regulations concerning payments to waste tire processors. However, although you state confidential information is contained "throughout" the submitted documents, you did not specifically mark the information to show what sections constitute monthly report information and TNRCC reports based on that information. Section 361.493 may make some of this information confidential, but this office is unable to make that determination without more explanation and specifically marked documents. See Open Records Decision No. 419 (1984) at 3 (a general claim that an exception applies to an entire document when it is clearly not applicable to all of the information does not conform to the procedural requirements of chapter 552).

You also contend that "TNRCC reasonably anticipates that one or more of the audits will result in litigation." To secure the protection of section 552.103(a) a governmental body must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. See also Open Records Decision No. 588 (1991) at 7 (for purposes of section 552.103(a), a contested case under the [statutory predecessor to the Administrative Procedure Act, Gov't Code ch. 2001]<sup>2</sup> constitutes litigation). TNRCC's rules provide that it may pursue administrative or civil penalties to ensure compliance with its regulations.

You argue that TNRCC anticipates that the audits may lead to litigation. We note that you do not argue that litigation is reasonably anticipated as to each of the companies being audited, but rather that the audits may lead to litigation with some of the audited companies. You submitted to this office for review audit materials concerning various waste tire processors. It is not apparent that litigation is reasonably anticipated as to each and every one of the companies. Our review of the information at issue indicates that litigation may be reasonably anticipated as to some of the companies that were audited.

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<sup>2</sup>The Administrative Procedure Act, formerly codified as article 6252-13a, V.T.C.S. (1925), was codified as chapter 2001 of the Government Code in a non-substantive revision of statutes relating to areas of government that affect both state and local entities. Acts 1993, 73d Leg., ch. 268, § 1, at 734.

We note that your letters did not provide enough information to show that litigation was reasonably anticipated. Our determination was based on handwritten auditor's notes on records submitted to this office. Our review did not indicate that litigation was reasonably anticipated as to other companies.

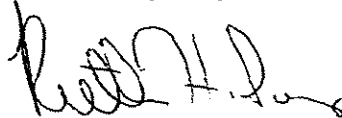
Our review also shows that as to the companies for which litigation is reasonably anticipated, the documents at issue are related to the anticipated litigation. However, the opposing parties in each of the respective anticipated lawsuits have already seen some of the records at issue. When the opposing parties to litigation have already seen the records, there is generally no justification for now withholding those records from the requestor pursuant to section 552.103(a).

We have marked the audit files to indicate information relating to reasonably anticipated litigation. This marked information may be withheld from disclosure pursuant to section 552.103(a). All information that is not confidential but has been seen by the respective opposing parties must be disclosed. If there is certain information that you contend is confidential, you must mark the *specific* portions of the documents and send the marked portions, along with your argument as to why the documents are confidential, to this office. You must immediately release all other information that is not excepted from disclosure under section 552.103(a).

We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. Since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within TNRCC's discretion to release non-confidential information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Ruth H. Soucy", written over a horizontal line.

Ruth H. Soucy  
Assistant Attorney General  
Open Government Section

RHS/LRD/rho

Ref.: ID# 28587

Enclosures: Marked documents

cc: Mr. Frank M. Reilly  
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